LIBRARY
SUPREME COURT, U. S.

No. 74-1268

FILED
MAY 7 1975
MICHAEL RODAK, JR., CLERK

In the

# Supreme Court of the United States

OCTOBER TERM, 1974

CITY OF CHICAGO, RICHARD J. DALEY, JAMES B. CONLISK and WILLIAM E. DOWNES, JR.,

*Petitioners,*

*vs.*

CHICAGO AREA MILITARY PROJECT, EMILY FRIEDMAN, STEVE ROMANOWSKI, LAWRENCE WILLBORN and LYDIA WILLBORN,

*Respondents.*

## BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

EDWARD T. STEIN
SYBILLE FRITZSCHE
HOWARD EGLIT
ROGER BALDWIN FOUNDATION OF ACLU, INC.
5 South Wabash
Room 1516
Chicago, Illinois 60603
312/726-6180
Attorneys for Respondents

The Scheffer Press, Inc.—(312) 263-6850

## TABLE OF CONTENTS


PAGE

QUESTION PRESENTED ..... 1

STATEMENT OF CASE ..... 2-3

REASONS FOR NOT GRANTING THE WRIT ..... 4-9

I. Petitioners Presented for Review Issues Not Presented by This Case ..... 4-5

II. The Decision of the Court of Appeals is in Accord With Well-Established Case Law, Including Decision of This Court ..... 5-9

1. There Can Be No Question That the Terminal Buildings at O'Hare Airport Constitute a Public Forum ..... 5-6

2. Petitioners' Reliance on This Court's Ruling in *Lehman* v. *City of Shaker Heights* is Completely Misplaced ..... 6-9

CONCLUSION ..... 10


CASES


*Brown* v. *Louisiana*, 383 U.S. 131 (1966) ..... 6

*Cox* v. *Louisiana*, 379 U.S. 559 (1965) ..... 6

*Cox* v. *New Hampshire*, 312 U.S. 569 (1941) ..... 8

*Grayned* v. *City of Rockford*, 408 U.S. 104 (1972) ..... 8

*Kunz* v. *New York*, 340 U.S. 290 (1951) ..... 8

*Kuszynski* v. *Oakland*, 479 F.2d 1130 (9th Cir. 1973) .. 6

*Lehman* v. *City of Shaker Heights*, 94 S.Ct. 2714 (1974) ..... 6, 7, 8

*Martin* v. *Struthers*, 319 U.S. 141 (1943) ..... 9

PAGE

*Organization for a Better Austin* v. *Keefe*, 402 U.S. 415 (1971) ..... 8, 9

*Reilly* v. *Noel*, 384 F.Supp. 741 (D.R.I. 1974) ..... 6

*Saia* v. *New York*, 334 U.S. 558 (1948) ..... 8, 9

*Schneider* v. *State*, 308 U.S. 147 (1939) ..... 8,9

*Shuttlesworth* v. *Birmingham*, 394 U.S. 147 (1969) ..... 8

*Unemployed Workers Union* v. *Hackett*, 332 F.Supp. 1372 (D.R.I. 1974) ..... 6

*Wolin* v. *Port Authority of New York*, 392 F.2d 83 (2d Cir. 1968), cert. den. 393 U.S. 940 (1968) ..... 6

*Women Strike for Peace* v. *Morton*, 472 F.2d 1273 (C.A.D.C. 1972) ..... 6

OTHER AUTHORITIES

Kalven: "The Concept of a Public Forum: Cox v. Louisiana", 1965 *Supreme Court Review* 1 ..... 8

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

---

*No. 74-1268*

---

CITY OF CHICAGO, RICHARD J. DALEY, JAMES B. CONLISK and WILLIAM E. DOWNES, JR.,

*Petitioners,*

*vs.*

CHICAGO AREA MILITARY PROJECT, EMILY FRIEDMAN, STEVE ROMANOWSKI, LAWRENCE WILLBORN and LYDIA WILLBORN,

*Respondents.*

---

## BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

---

### QUESTION PRESENTED

Whether the City of Chicago's total and absolute prohibition through an informal, general and oral regulation of peaceful and nondisruptive distribution of leaflets in all public areas of Chicago O'Hare International Airport open to the general public is a prohibition consistent with the First Amendment.

## STATEMENT OF THE CASE

As a preface to stating the case, respondents would stress the impropriety of petitioners' statement. Petitioners attempt to relitigate the facts in this Court, offering testimony which obviously was considered by the trial court in rendering its findings—findings with which the Court of Appeals found itself in accord. Whatever room may be left for disputing the conclusions of law which the two lower courts arrived at (and respondents maintain there is none), it certainly is too late in the day to responsibly expect this Court to sit as a court of first impression to weigh and assess trial court testimony.

Respondent Chicago Area Military Project is an unincorporated, non-profit organization, known as CAMP, which publishes a monthly newsletter specifically directed to members of the military forces and distributed to them as well as to members of the general public. On March 11, 1973, two members of CAMP were distributing said newsletter at O'Hare Airport "in the general area of the check-in counters but somewhat removed from the lines of persons waiting to be served at the counter." Petitioners' Appendix, p. 3a. "They did not," as the Court of Appeals so stated, "approach anyone in a line." Pet. App., p. 3a.

After being warned that they would be arrested for their leafletting, on the basis of an unwritten and unpublished rule of the City of Chicago prohibiting leafletting in the public areas of the city's airports, respondents and 5 other CAMP members similarly engaged left the airport.

Respondents sought injunctive and declaratory relief to protect their First Amendment rights in the United States

District Court. The Court granted their motion for preliminary injunction. In so doing, the Court specifically found "(t)hat plaintiffs do not interfere with the functioning of O'Hare Field Airport for its use as an airport." (Respondents' Appendix, at 2a). The trial court further specifically found that "the plaintiffs do not charge for their literature and do not 'force' said literature upon the public." (Resp. App., at 2a).

The Court of Appeals left undisturbed the trial court's findings. And, as the Court stated:

> There is no question but that the terminal buildings at O'Hare Airport, city-owned and operated, are freely available to the general public and that their wide-open public areas which perhaps 90,000 transients visit daily can accommodate seven persons peacefully distributing, in groups of twos and threes, free copies of their publication to interested persons. Indeed, although airport and airline officials testified that unrestricted leafletting and solicitation could conceivably interfere with important airport operations, *the City does not contend that the activities of the plaintiffs do in fact obstruct airport traffic.* Pet. App. p. 7a (Emphasis added).

## REASONS FOR NOT GRANTING THE WRIT

### I. PETITIONERS PRESENT FOR REVIEW ISSUES NOT PRESENTED BY THIS CASE.

Petitioners, by their posing of the Question Presented, seek to bring before this Court issues which in fact simply are not present.

Contrary to petitioners' broad delineation of the question, and their arguments of terribles, the ruling of the Court of Appeals in no way erects a total bar to the regulation of leafletting and soliciting within the terminal buildings of the city-owned airport. Indeed, the Court explicitly vouchsafed such a ban and carefully limited its ruling to the facts before it, leaving open the possibility of future regulations:

> We conclude that the district court did not err in enjoining the defendants from obstructing the plaintiffs from leafletting in the terminal buildings of O'Hare Airport. At the same time, we recognize, as the district court did when it excluded the "fingers" leading to the arrival and departure gates from its injunction, that the Constitution does not prohibit all regulation of leafletting in publicly owned facilities. . . . Thus regulations prohibiting leafletting might validly be extended from the passageways leading to the arrival and departure gates to include also leafletting at check-in counters, for example, if it should appear that such activities substantially interfere with rapid and efficient airport operations. However, it does not appear from the present record that the plaintiffs' leafletting took place at check-in counters or with people waiting at them to be checked in or that the plaintiffs intend in the future to carry on their activities at such places. It will be time enough, therefore, to consider enlarging the present exception to the general scope of the injunction in question if and when

the City promulgates a suitable restrictive regulation and makes the requisite showing to the district court of the need for it. Pet. App. pp. 8a-9a.

## II. THE DECISION OF THE COURT OF APPEALS IS IN ACCORD WITH WELL-ESTABLISHED CASE LAW, INCLUDING DECISIONS OF THIS COURT.

### 1. THERE CAN BE NO QUESTION THAT THE TERMINAL BUILDINGS AT O'HARE AIRPORT CONSTITUTE A PUBLIC FORUM.

The description provided by the Court of Appeals at O'Hare Airport is an accurate one and relevant to the determination that the terminal buildings at O'Hare Airport indeed constitute a public forum. The Court stated:

> O'Hare Airport, located within the limits of the City of Chicago, is owned by the City and administered by the City's Department of Aviation. It is a two-or-three minute drive from the nearest residential area, a thirty-minute drive from the Chicago downtown area with which it is connected by major expressways and is served by bus lines and taxicabs. Private automobiles are accommodated in massive public parking lots. Leased space in the airport terminal buildings houses numerous concessionares including restaurants and shops of every description. Seventy-two departure gates handle more than 100 flights per hour during peak periods. Approximately 20,000 persons are employed at the airport and a total of 100,000,000 passengers, persons accompanying them, and employees, use the facility each year. Pet.App., p. 3a.

It is relevant, also, in the context of this case, to point out that the district court specifically found "that large numbers of persons in the military service use the facilities at O'Hare Field Airport; many of whom never leave the terminal buildings." (Resp. App., at p. 2a).

Given these findings and the nature of the terminal buildings, nothing could be more correct than the conclusions of the two lower courts that plaintiffs were exercising First Amendment rights in a preeminently public place. Indeed, given the 100,000,000 people passing through this forum, and the nature of the activities conducted therein, the O'Hare Airport terminal buildings are at the least equally as public a forum as the State Capitol held to be a public forum in *Cox* v. *Louisiana*, 379 U.S. 559 (1965), and the public library held to be a proper forum for a vigil in *Brown* v. *Louisiana*, 383 U.S. 131 (1966). Fully consistent with this conclusion are numerous other rulings: *Kuszynski* v. *Oakland*, 479 F.2d 1130 (9th Cir. 1973) (use of city airport for leafletting and picketing); *Women Strike for Peace* v. *Morton*, 472 F.2d 1273 (C.A.D.C.) 1972) (use of the Ellipse, a public park in Washington, D.C., for an anti-war display); *Wolin* v. *Port Authority of New York*, 392 F.2d 83 (2d Cir. 1968), cert. denied 393 U.S. 940 (use of bus terminal for leafletting); *Reilly* v. *Noel*, 384 F.Supp. 741 (D.R.I. 1974) (use of State House rotunda for prayer services); *Unemployed Workers Union* v. *Hackett*, 332 F.Supp. 1372 (D.R.I. 1971) (use of waiting room of Department of Employment Security for leafletting.)

### 2. PETITIONERS' RELIANCE ON THIS COURT'S RULING IN LEHMAN v. CITY OF SHAKER HEIGHTS IS COMPLETELY MISPLACED.

Petitioners almost completely rely upon *Lehman* v. *City of Shaker Heights*, 94 S.Ct. 2714 (1974), as basis for their petition. The striking dissimilarity of facts makes that reliance totally meritless. The issue in *Lehman* was whether publicly owned buses which had never before held themselves out as public fora were indeed such.

Not at issue was the use of the central loading and discharge depot of the bus company—indeed, the Court's opinion is devoid of any reference to any such structure even existing.

Here, the lower courts were not addressing, nor were the respondents using—or even seeking to use, the airplanes landing and departing from O'Hare Airport. They were not even using the "fingers" leading to the planes. And indeed, the trial court specifically exempted from its injunction order these "fingers", an exemption which the Court of Appeals noted approvingly. Pet. App., p. 9a.

Thus, on the one hand, in *Lehman*, this Court was dealing with enclosed vehicles—buses, carrying a limited number of persons and devoted to a very limited and specific use, e.g., transportation from one point to another. And on the other hand, in this case, the courts were dealing with massive structures, through which 100,000,000 people pass annually, in which numerous businesses operate, in which magazines, newspapers, and the numerous shops' articles are held out for sale. Mere recitation of the factual disparities virtually compels the logical conclusion that *Lehman* is simply irrelevant.

Petitioners vainly parade arguments of terribles to try to obscure the fundamental difference between an airport terminal and a bus. Thus, they raise the spectre of the "entire operation of O'Hare" being affected (Pet. Brief, at 10), and of "all persons" being "free to enter the terminal buildings . . . and thrust themselves or their ideologies upon" passengers. *Ibid.* Thus, "airport operations might be seriously disrupted." *Ibid.*

Petitioners apparently are unable to read the clear finding of fact made by the trial court that respondents

did not "interfere with the functioning of O'Hare Field Airport." They apparently are unable to read the very carefully constructed ruling of the Court of Appeals, which invited narrowly drawn regulation. Rather, seeking to ignore the virtually black letter law enabling them to regulate as to time, place, and manner[1], they will settle for nothing less than a total ban on First Amendment rights—a ban which the lower courts here of course could not countenance.

Petitioners' second argument, relying on Mr. Justice Douglas' concurring opinion in *Lehman*, supra, and invoking right to privacy which protects a captive audience from having unwelcome views thrust upon it, is equally inapposite. It is fundamental that First Amendment right are preeminent. If they are to be sacrificed, only the most careful balancing of interests can be employed—a balancing which must, given the nature of the public arena here and the correlative minimal expectation of privacy of the arena's users, come out on the side of free speech. As Mr. Justice Roberts said in *Schneider* v. *State*, 308 U.S. 147, 161 (1939):

> This court has characterized the freedom of speech and that of the press as fundamental personal rights and liberties. The phrase is not an empty one and was not lightly used. In every case, therefore, where legislative abridgment of the right is asserted, the court should be astute to examine the effect of the chal-

[1] See, e.g., *Grayned* v. *City of Rockford*, 408 U.S. 104 (1972); *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415 (1971); *Shuttlesworth* v. *Birmingham*, 394 U.S. 147 (1969); *Kunz* v. *New York*, 340 U.S. 290 (1951); *Saia* v. *New York*, 334 U.S. 558 (1948); *Cox* v. *State of New Hampshire*, 312 U.S. 569 (1941); *Lovell* v. *Griffin*, 303 U.S. 444 (1938); Kalven, "The Concept of a Public Forum: Cox v. Louisiana", 1965 *Supreme Court Review* 1.

> lenged legislation. Mere legislative preference or beliefs respecting matter of public convenience may well support regulation directed at other personal activities but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions.

Thus, in *Martin* v. *Struthers,* 319 U.S. 141 (1943), the right to privacy of homeowners in keeping their places of residence free from the doorbell ringing of religious zealots was found to be deserving of lesser protection than the rights of Jehovah's Witnesses to proselytize for their religion. Similarly, the interest of homeowners in being protected from residential picketing, when placed on the scale opposite competing First Amendment activities, was found wanting in *Organization for a Better Austin* v. *Keefe,* 402 U.S. 415 (1971). And prohibition on the use of loudspeakers in public places for the dissemination of public and political issues was found violative of First Amendment rights, though such noise certainly constitutes an invasion of privacy of the citizen subjected to such noises. *Saia* v. *State of New York,* 334 U.S. 358 (1948).

## CONCLUSION

The record of the case below and the arguments made by Petitioners are devoid of any novel issue of constitutional law, as yet unsettled, which could claim this Court's time and consideration. The criteria establishing the character of a public place as a public forum are clear and met by the facts in this case.

Similarly clear and unequivocal are the legally permissible restrictions which a governmental body can put on the use of such public forums when used for protected First Amendment activities. These restrictions were recognized by the Court of Appeals, which invited Petitioners to enact suitable regulations: an invitation Petitioners have chosen to ignore.

Thus, Respondents pray this Court to deny Petitioners' Writ of Certiorari.

Respectfully submitted,

EDWARD T. STEIN
SYBILLE FRITZSCHE
HOWARD EGLIT
ROGER BALDWIN FOUNDATION OF ACLU, INC.
5 South Wabash
Room 1516
Chicago, Illinois 60603
312/726-6180
*Attorneys for Respondents*

## APPENDIX

IN THE UNITED STATES DISTRICT COURT

For The Northern District Of Illinois

Eastern Division

CHICAGO, AREA MILITARY PROJECT, a voluntary organization; et al.,

*Plaintiffs,*

v.

CITY OF CHICAGO, a municipal corporation; et al.,

*Defendants.*

No. 73 C 758

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The plaintiffs filed their complaint for injunctive, declaratory and pecuniary relief on March 26, 1973 and their amended complaint on May 21, 1973.

2. The plaintiffs sought to enjoin the defendants from preventing plaintiffs and each of them from leafletting or distributing literature within the terminal buildings at O'Hare Field Airport, a public facility owned by the City of Chicago, and to prevent defendants from arresting, harassing, intimidating or otherwise obstructing the plaintiffs in pursuit of activity protected by the First and Fourteenth Amendments to the United States Constitution.

3. That the plaintiff unincorporated association among other things publishes a monthly newspaper called CAMP NEWS which is primarily directed to members of the armed services and which carries news of the "G.I." Movement and other news of general legal and political import.

4. That the individual plaintiffs and others sought to distribute said CAMP NEWS and other literature on March 11, 1973 and March 18, 1973 within the O'Hare Field Terminals and were prevented from doing so by the defendants, their agents, employees and/or servants thus causing irreparable harm to the plaintiffs.

5. That large numbers of persons in the military service use the facilities at O'Hare Field Airport; many of whom never leave the terminal buildings but change flights for other locations.

6. That the defendants have no objection to plaintiffs or others distributing literature on the sidewalks outside the terminal buildings.

7. That newspapers, magazines and other literature are readily available for sale at concession stands as well as in machines in the terminal buildings, i.e. The Chicago Tribune.

8. That the plaintiffs do not charge for their literature and do not "force" said literature upon the public.

9. That plaintiffs do not interfere with the functioning of O'Hare Field Airport for its use as an airport.

## CONCLUSIONS OF LAW

THE COURT FINDS:

1. that the defendants are required by law (Municipal Code of Chicago §§25-27) to promulgate written rules, regulations or laws to codify and publicize administrative policy for O'Hare Field Airport.

2. that no lawful rule, regulation or law exists preventing the plaintiffs or others from leafletting, distributing or otherwise making available literature they seek to distribute at O'Hare Field Airport and defendants conduct is in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

3. that the plaintiffs and each of them were engaged in activity protected by the First and Fourteenth Amendments to the United States Constitution and said conduct of the defendants, their agents, employees and/or servants constitutes prior restraint on such activity and was unlawful.

4. that the plaintiffs will suffer immediate and irreparable harm in that the O'Hare Field Airport Terminals are the most effective and efficient forum for plaintiffs to distribute literature especially since their focus is military personnel.

THE COURT ORDERS THAT:

the defendants, their agents, employees and/or servants are hereby restrained and enjoined from arresting, harassing, intimidating or otherwise obstructing plaintiffs engaged in leafletting or otherwise distributing CAMP NEWS or other literature within the terminal buildings (not to include the "fingers" leading to the arrival and departure gates) of O'Hare Field Airport.

ENTER:

/s/ Richard B. Austin
United States District Judge

DATED: April 1, 1974